UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

METROPOLITAN OPERA GUILD, INC.

Employer

and Case No. 2-RC-22745

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AFM, AFL-CIO[1]

Petitioner

DECISION AND DIRECTION OF ELECTION

Metropolitan Opera Guild, Inc., a New York not-for-profit corporation with a principal office and facility in New York City, ("the Employer") is primarily engaged in providing educational programs to the public. The annual gross revenue of the Employer, exclusive of restrictive grants, exceeds $1 million. Annually, in the course and conduct of its business, the Employer purchases and receives goods and supplies valued in excess of $50,000 directly from suppliers located outside the state of New York. Based upon the stipulation of the parties, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

Associated Musicians of Greater New York, Local 802, AFM, AFL-CIO ("the Petitioner" or "the Union") filed a petition on August 8, 2003, seeking to represent a unit of all teaching artists employed by the Employer in the Creating Original Opera Program and directly related programs. Both parties filed briefs and they have been duly considered.

[1] The name of the Petitioner appears as corrected at the hearing.

The parties disagree on the following issues: (1) whether the teaching artists technicians are employees within the meaning of Section 2(3) of the Act or independent contractors; (2) whether Peter Hoyle is a manager or supervisor, and if not, whether he shares a community of interest with the other teaching artists; and (3) whether the New York City Board of Education, an exempt entity, and the Employer are joint employers.

The Employer contends that the teaching artists are independent contractors. Further, the Employer contends that in the event the teaching artists are found to be employees within the meaning of the Act, they do not share a sufficient community of interest among themselves to constitute a separate appropriate bargaining unit. The Petitioner, on the contrary, contends that the teaching artists are employees within the meaning of the Act. Further, the Petitioner contends that the teaching artists are employed by the Employer, an entity that is not a joint employer with the New York City Board of Education.

Based on the evidence and relevant law, I conclude that the teaching artists are employees within the meaning of Section 2(3) of the Act and that the petitioned-for unit is appropriate for the purposes of collective bargaining.

I. BACKGROUND

The Employer, a not-for profit, charitable organization established in 1935, has as its mission the enhancement of appreciation of opera as an art form. Its education department has the responsibility of satisfying this stated purpose. It is not part of the Metropolitan Opera or Lincoln Center, nor is it a music school. The Employer's managing director is David Dik. Mr. Dik previously served as head of the Employer's Education

Department. Mr. Dik is an educator, who commenced his association with the Employer as a teaching artist. In addition to the education department, the Employer maintains a publishing unit, which is responsible for the Opera News Magazine. The Employer also has a merchandising program and a membership department. The Employer employs approximately 50 employees, in addition to the teaching artists in dispute herein. Mr. Dik noted that education was the foremost service provided by the Employer. The Employer derives its income from grants, donations and fees for its educational services from schools. Mr. Dik estimated that 50% of the income is derived from foundation support, 35% from earned income, such as school fees, and the remainder from dedicated monies in the endowments.

A. Education Department

The Employer's Education Department administers educational programs to support the art form of opera. Opera was described as an art form that uses music, drama, and, at times, movement, in a theatrical setting to tell a story. It is a form of music theatre. While the Employer focuses substantial attention on educating the young, its educational services are also directed toward the adults and families.

The primary initiative of the education department of the Employer is the "Creating Original Opera" program ("COO"). The Employer provides this program to school age children in the New York City Public School system, as well as students in other schools, and more recently, colleges. When a school contracts with the Employer for its COO program, the Employer provides two teaching artists to work at the school and teach the

students all aspects of the formation of an opera company. The students are trained to write, compose and stage an original opera. In constructing an opera company of their own, students are taught all aspects of the production of an original opera, including how to write a story, compose the music, prepare the set, record the events, publicize the opera, and perform the finished product. The Employer also provides related educational programs, such as the "all school" program and "in class" program. These programs, while also geared toward teaching an appreciation for this art form, do not culminate in an original opera that is created and performed by the students. However, the "all school" program could include an opera. Additionally, the Employer conducts teacher training, which is geared toward making schoolteachers proficient in implementing the COO program with only technical support from a teaching artist. This training will occur usually during the summer, but may also occur during the school year. In the artist residency program, two teaching artists work in a school, and present the COO program. In the support residency program, one teaching artist is assigned to a school and one teaching artist is assigned to work with a trained teacher at that school. A teaching artist in the technical support program, assists schoolteachers who have been trained to present the program, but need assistance with certain parts of the COO curriculum.

Teaching Artists

The Employer maintains a pool of approximately 45 trained teaching artists, who have skills as some or all of the following: musicians, dancers, singers, actors, choreographers, visual artists, stage directors, composers and writers. The Employer's educational program receives oversight from Shelley Bransford, the Program Director/Curriculum Development, who works under the supervision of Ruth Nott, the

Director of Program Development and Special Initiatives. As an educational program, the Employer operates its opera education initiatives on a school calendar basis. As such, during the summer preceding the new school year or in early September of the new school year, the Employer surveys its pool of teaching artists, who it has previously trained and who have worked in any of the programs, concerning their availability for the coming school year. Once the Employer has determined which schools desire its services and which teaching artists are available, the Employer assigns teaching artists to a school. The Employer described this process as "match making". While the Employer stated that teachers may request a specific school or veto an assignment, there was no evidence that this has occurred. It appears that the teaching artist is assigned to a school based on their specific skills and the needs of the program. Ms. Bransford and Ms. Nott determine the rate of pay to be offered to a teaching artist based on the teaching artists' experience and skills. A letter of agreement is thereafter sent for the teaching artists' assent. When a teacher works a sufficient number of days pursuant to an Employer-determined formula, he or she may request an increase in their compensation rate. On occasion a teaching artist has requested a pay raise prior to achieving the requisite seniority. The letter of agreement specifies the number of hours required by the school and the fee for doing the program. The teaching artist working in the COO program is paid half the fee at the outset of the program and the remaining half when the program is completed. The teaching artist receives a Form 1099 from the Employer setting forth the amount earned each year, and taxes are not withheld from the pay.

The Employer provides a formal training session for its new teaching artists when funding is available. More recently, as funds have been scarce, training of new teaching artists has been done in conjunction with a teacher training session conducted by the

Employer for schoolteachers. The Employer provides each teaching artist with a detailed binder, entitled “Curriculum Resource Guide for Creating Original Opera”. Teaching Artist Greg Pliska referred to this document as the teaching artists’ bible or source of all knowledge. He said that any question a teaching artist might have regarding the curriculum can be answered in the Guide. He said that after teaching the COO curriculum several times, there is less of a need to refer to the “source” as it has become engrained in the teaching artist’s presentation of the course. He described the Guide as a detailed, step-by-step instruction on how the program is implemented. The Employer categorized the Guide as being merely suggested approaches to be used by the teaching artist when presenting the program and a compilation of suggested exercises to be used by the students in all phases of their opera company.

While there is a disciplinary procedure for full time employees, including the possibility of discharge, the Employer states that no such procedure exists for teaching artists. However, Shelley Bransford visits each school site 3 to 4 times during the program to monitor its progress through to the final act. On one occasion, she spoke to a teaching artist who was having difficulty with a specific aspect of the program. Ms. Bransford demonstrated how this aspect of the program should work and then observed the teaching artist attempt to implement it. Ms. Bransford also meets with each teaching assistant to conduct an exit interview to ensure that the program went smoothly. Ms. Bransford also sends e-mails to teaching artists reminding them of matters set forth in the Guide. Ms. Bransford also conducts one or two artist meetings each school year. These sessions are strongly suggested for all teaching artists, even those not working that semester. The Employer uses these sessions to present the teaching artists with current information about the program. If a teaching artist is not available for the meeting, the materials distributed at

that meeting are sent to him or her. Mr. Dik testified that if a teaching artist did not meet the hours required by the program, the Employer would have to replace that teacher. When asked if that teacher would be employed again, Mr. Dik replied that "obviously if the program did not go well in that school one has to address that issue."

The Employer provides the teaching artist with kits for materials required in the production. This kit contains carpentry and electrical supplies that will be used in the performance and are provided upon a written requisition. The Employer also provides the teaching artist with the handbooks that the teaching artist will give to the students. The handbook contains information on technical aspects of the production, such as composition booklets, and booklets for stage managers, electricians, set designers, public relations people, historians, composers, and performers.

C. Peter Hoyle

The Employer employs one full-time teaching artist in the COO program. Peter Hoyle, a visual artist and a multi-talented individual, was a teaching artist in the pool of other teaching artists, until he approached the Employer and asked for a full-time commitment. David Dik testified that the Employer was able to put together sufficient hours of work for Mr. Hoyle to create a full-time position for him in July 2002. Mr. Hoyle is presently on the Employer's payroll and receives his pay on a bi-weekly basis. He is subject to withholding of taxes and receives benefits.

Mr. Hoyle works as one of the five teaching artists working at the Ridge Street School. Mr. Hoyle, who reports directly to Ms. Nott, works with students who are of several different age and grade levels. He is also one of two teaching artists at the Brooklyn Children's School. He is the only teaching artist at MS-51 and also performs tech work,

which means he provides support to schools with schoolteachers trained in the program. During the past summer, he worked at the teacher training sessions with one other teaching artist and Shelley Bransford at the Universities of Georgia and Mississippi locations. As this program was to be a day shorter than usual, Mr. Hoyle worked with David Dik to condense the presentation.

In addition to teaching, Mr. Hoyle has developed a document that describes the scope and sequence for each grade level with which the Employer works at the Ridge Street School. He also collects the documentation for the students at this school. Mr. Hoyle is working with the principal and teachers at the school to develop new curriculum based upon the learning in each grade from kindergarten through fourth grade. This project is being prepared so the Employer can determine whether to implement the program for the fifth grade. The record does not describe the amount of time Mr. Hoyle spends with these other duties as compared with teaching.

Also in addition to his teaching, Mr. Hoyle spends time traveling in New Jersey seeking schools that might be interested in offering the Employer's programs. He also came up with the idea for a new program, entitled "Fine Arts Day". It appears that he took it upon himself to quote a fee for this program, and was later told that he did not price it appropriately.

Another project that Mr. Hoyle has been working on is the creation of a promotional video for the COO program. This video will be used in the promotion of the Employer's program.

D. Employees who have Membership in another Union

Two teaching artists, Melanie Martin Long and Stephen Golux apparently are members of a union when performing their non-teaching work. They informed the Employer that they would like their individual employment agreements to be entered into with the Society of Stage Directors and Choreographers Union ("SSDC"). The Employer agreed to do so. The record is not specific with regard to this role played by SSDC, but there is no evidence that the Employer and the SSDC entered into a Section 9(a) relationship in this regard. The SSDC appears to have acted solely as these two individuals' personal agents.

II. ANALYSIS AND CONCLUSIONS

A. Teaching Artists Are Employees

Based on the record, I conclude that the teaching artists are employees within the meaning of the Act, and not independent contractors as asserted by the Employer. Although some of the indicia of independent contractor status are present here, a majority of factors compel a conclusion that the teaching artists are, in fact, employees.

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." In determining whether individuals are employees or independent contractors, the Board applies the common law test of agency. *Roadway Package System*, 326 NLRB 842, 850 (1998). Under this test, the Board examines all incidents of the parties' relationship, with no single factor being decisive, supra, at 850 (citations omitted). While all the factors set forth in Restatement (Second) of Agency, Section 220, should be considered, it must be determined whether or not there are a sufficient number of factors to establish the employee relationship. Id. Significantly, the burden of proof falls upon the party asserting the independent contractor status. *BKN, Inc.,* 333 NLRB No. 14, slip op. at 2 (2001).

The standards used in the Restatement in examining whether individuals are employees or independent contractors, are as follows:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or independent contractor the following factors, among others, are considered:

(a) The extent of control the employer exercises over the individual's work details.

(b) Whether the person employed is engaged in a distinct occupation or business.

(c) Whether the work of that occupation is usually performed under an employer's supervision.

(d) The skill required by the occupation.

(e) Whether the employer or the worker supplies instrumentalities, tools, and the place of work.

(f) The length of employment.

(g) Whether payment is made according to the time spent or by the job.

(h) Whether the work is part of the employer's regular business.

(i) Whether the parties believe they are creating an employer-employee relationship.

(j) Whether "the principal is or is not in the business."

Under the Restatement, the right of control continues to be paramount in determining independent contractor status. Nevertheless, the other factors are considered important and must be afforded weight in determining whether the right of control is present in any given situation. For example, *Roadway* involved pick up and delivery drivers at two

of the employer's terminals whom the Board found to be employees, rather than independent contractors. In reaching this conclusion, the Board applied the common law of agency test as set forth in the Restatement. Specifically, the Board relied on the following to support its finding:

> [T]he drivers here do not operate independent businesses, but perform functions that are an essential part of one [employer's] normal operations; they need not have any prior training or experience, but receive training from the [employer]; they do business in the [employer's] name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the [employer's] business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. *Roadway*, supra, at 851.

The Board also noted that:

> Other support for employee status can be found in [the employer's] compensation package for the drivers. Here, [the employer] establishes, regulates, and controls the rate of compensation and financial assistance to the drivers as well as the rates charged to customers. Generally speaking, there is little room for the drivers to influence their income through their own efforts or ingenuity. Supra, at 852.

The Board reached the opposite conclusion with respect to delivery drivers in *Dial-A-Mattress,* 326 NLRB 884 (1998), a companion case to *Roadway*. The Board concluded in *Dial-A-Mattress* that the common law of agency test factors weighed more strongly in favor of independent contractor status for the drivers in that case. In finding the drivers to be independent contractors, the Board relied, in part, on the fact that the drivers had, "significant entrepreneurial opportunity for gain or loss." Supra at 893. In that regard, the Board noted that some drivers had more than one van to perform deliveries, that they could and did negotiate economic terms in their agreements with the employer, and that they had no guaranteed minimum compensation. Supra at 892. Additionally, they could decline to work or make their trucks available on certain dates without advance notice to

the employer and without penalty. Supra at 887. The Board distinguished *Dial-A-Mattress* from *Roadway* in part on the basis that the "elements of Roadway's compensation plan, in effect, result in both minimum guarantees and effective ceilings for its drivers" and the fact that, "Roadway drivers are required to provide delivery services each scheduled workday." Moreover, there was "no evidence that the Roadway drivers [could] negotiate . . . special deals." Id. at 893.

In deciding whether writers, artists and designers were employees or independent contractors, the Board looked at the following factors: (1) the degree of supervision or input the employer has in the individual's performance or creation; (2) whether the individual performs functions that are an essential part of the employer's normal operations; (3) whether the individual works exclusively for the employer; (4) the entrepreneurial discretion possessed or risk assumed by the individual; (5) whether the employer supplies the equipment/materials used by the individual; and (6) whether the employer withholds taxes and/or provides fringe benefits and/or workers' compensation coverage. *BKN, Inc.,* supra, slip op. at p. 2; *Musicians (Royal Palm Theatre),* 275 NLRB 677, 682 (1985); *The Comedy Store*, 265 NLRB 1422 (1982); and *Strand Art Theatre*, 184 NLRB 667, 668 (1970).`

In *BKN*, supra, the Board found, in agreement with the regional director that freelance writers, artists, and designers were employees, rather than independent contractors. With regard to the writers specifically, the Board based its finding on the fact that the employer exercised extensive control over them through the imposition of time deadlines and editorial review of the content of their work, supra, slip op. at 4. The Board also noted that, "the writers, like the carriers here, clearly perform functions that are an

essential part of the [employer's] normal operations, and they constitute an integral part of the [employer's] business under its substantial control." Id. The Board found the writers to be employees although a number of factors militated in favor of independent contractor status. Those factors supporting an independent contractor finding, many of which are present here, included: "the writers work out of their homes, set their own hours, provide their own equipment and materials, are not subject to discipline, sign agreements to work on each episode, are paid per episode, may work for other employers, receive no benefits, and have no taxes or other payroll deductions withheld." Id.

Here, some factors are present that may point to a finding that teaching artists are independent contractors. They are free to work for other employers at any time, even after they have committed to work for the Employer. Taxes are not withheld from their paychecks and they receive no benefits. However, I note that the Board does not regard as determinative the fact an employer elects not to make payroll deductions or tax withholdings. *Miller Road Dairy*, 135 NLRB 217 (1962). The presence of these few factors favoring independent contractor status is insufficient to overcome the Employer's burden of establishing such status where there exists other, more compelling factors to support the conclusion that these teaching artists are employees. Here, most significantly, the Employer trains newly hired teaching artists and provides a detailed step-by-step procedure for the teaching artist to follow in implementing the Employer's COO program. While it is true that every teacher has different pedagogical skills and may use different exercises suggested by the Employer, each teaching artist must teach the same curriculum and that curriculum must culminate in the production of an original opera that has been written, composed and presented by the students. The teaching artist in this program is

required by the Employer to submit a weekly schedule so that the Employer can monitor the progress of the process. Also by the 7th or 8th week of the program, the teacher must submit to the Employer the press release created by the class that describes the content of the opera. Without this submission, the Employer will not approve the press release and the program will not be completed. In other educational programs offered by the Employer, the performance of an opera may not occur, but the purpose of inculcating the student with an appreciation of this art form remains. While the COO program is the Employer's centerpiece, education and instilling a knowledge and appreciation of opera is the common thread of the Employer's Education Department.

Admittedly, the Employer does not instruct the teaching artists as to how to teach. The crux of the Employer's argument in this regard is that each teaching artist works to create his or her own program. The Employer contends that the Guide is just a starting point. The record belies this argument. While it is true that every teacher has his or her own style and teaching technique, the Employer provides a specific program with a detailed map as to how its program and educational purpose will be accomplished. The Employer does not contend that a teacher is free to disregard the Guide and independently rewrite the program as he or she sees fit. The nature of this work, i.e., educating young school children, does not allow for detailed instructions on when things happen on a second-to-second and minute-to-minute basis. The Employer's apparent contention that the flexibility that teaching artists have in determining which exercises to use enables the teaching artist to disregard the educational purpose of the Employer is not supported by the record. The Employer's educational programs, particularly the COO program, are highly structured and have a very specific and focused purpose. The Employer maintains a strict oversight of this program through periodic visits, the submission of periodic reports, feedback from the

schools, meetings with teaching artists, instructive e-mail communications, and an exit interview. As David Dik, managing director, testified, if the program did not go well at a specific school or if a teaching artist was not complying with the required hours commitment, the Employer would "obviously" have to deal with the situation.

In *Columbia Broadcasting System, Inc.*, 214 NLRB 637, 642 (1974), the Board found that the Employer exercised sufficient supervision and control over documentary film editors. According to the Board, although the film editors called upon their artistic and technical skills in making the documentary, they did so to meet the demands of the producer who envisioned the documentary and the message he sought to put across. The Board explained that the producer had the complete responsibility of creating, developing, and putting the documentary into its final form for showing and that under no circumstances could the film editor substitute his judgment for that of the director and was there to satisfy the demands of the producer. See also *The Pulitzer Publishing Company*, 101 NLRB 1005, 1007 (1952) (television cameramen were employees where the employer's program, news events, or publicity director directed in detail the work of the cameramen).

Additional factors also support the conclusion that the teaching artists are employees. Clearly, they perform an essential part of the Employer's educational department's mission. Further, the teaching artists have no property interest in the Employer, nor do they have any significant entrepreneurial opportunity. Although the Employer contends that the teaching artists exert control over their level of earnings by accepting as much or as little work as they choose, this factor does not distinguish the teaching artists from other on-call or as-needed employees whose income is typically directly related to the amount of time they are willing to work.

Also supporting a finding of employee status is the fact that by no later than September, the Employer informs the teaching artists of availability for work, through its agreements with schools. The Employer also provides the teaching artists with any equipment they need to stage the opera.

I find *Young and Rubicam International*, 226 NLRB 1271 (1976), upon which the Employer relies, distinguishable. In that case, there were numerous factors present that do not exist in the instant case that clearly established the photographers' status as independent contractors. For example, the photographers maintained their own studios where they performed most of their work. Also, the photographers had a significant capital investment in the highly sophisticated equipment used to complete their work. In addition, all of the photographers employed at least one full-time employee as an assistant and each employed an agent or representative who worked on a commission basis to seek work for the photographer, negotiate fees, etc. And, the photographers were paid on a flat fee basis, which had to cover their expenses such as the salaries of their assistants, commissions for agents, and use of their studios.

In *Musicians (Royal Palm Theatre),* supra, the Board held that freelance musicians for recordings used at a dinner theatre operated by the employer were employees, even though the musicians were not selected by the employer, were paid through a contractor, with no withholdings deducted by the employer, and were utilized for only a few hours, with no real expectation of future use. The Board held that these factors were outweighed by the fact that the employer's musical director exercised complete control over the musicians, telling them when to appear, what music to play, and how the music should sound. Thus, the Board concluded, the musicians were "under the continuous supervision

and exercised control of the [musical director] and subject to his complete discretion and artistic interpretation and taste." 275 NLRB at 862. As discussed above, the teaching artists remain at all times under the supervision of Shelley Bransford and Ruth Nott who ultimately control all elements of the production.

Thus, I conclude that teaching artists are employees within the meaning of Section 2(3) of the Act.

B. The New York City Schools are not a Joint Employer of the Teaching Artists

Contrary to the Employer's contention at the hearing, there is no evidence to support a finding that the Employer and the New York City schools system, an exempt entity, have a joint employer relationship. In its brief the Employer appears to have abandoned this argument. Thus, I cannot conclude that there is a joint employer relationship here.

C. The Petitioned-For Unit is Appropriate

The Board's procedure for determining an appropriate unit is to first look to the petitioned-for unit. If it is appropriate, then the inquiry ends. If the petitioned-for unit is not appropriate, the Board may examine alternative units suggested by the parties or may select a different unit. In determining whether employees possess a community of interest so as to constitute an appropriate unit, the Board examines factors such as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. It is well settled that the unit need only be an appropriate unit, not the most appropriate unit. *Bartlett Collins Company,* 334 NLRB No. 76, slip op. at 1 (2001).

I conclude that the petitioned-for unit is an appropriate unit. The Board has long held that a unit comprised of teachers is an appropriate unit for bargaining. See *Wyandanch Day Care Center, Inc*., 323 NLRB 339 (1997); *Baldwin League of Schools*, 281 NLRB 981 (1986). The Employer contends that, if found to be employees, teaching artists do not constitute a unit for purposes of collective bargaining because they (1) do not have similar wages, hours, benefits and other terms and conditions of employment; (2) they have different talents, skills and qualifications; and (3) they are not interchangeable.

The record in this regard does not support the Employer's contentions. All teaching artists are paid in the same manner. They receive a salary from the Employer, with half received upon signing the agreement to accept the teaching assignment and the remaining half upon submission of the final reports at the conclusion of the program. The Employer determines the individual's salary, but will discuss changes either upon the teaching artist achieving the requisite seniority or upon request. While more senior employees in the pool command a higher rate, all teaching artists receive pay within a general range.

All teaching artists present the Employer's educational programs to students or teachers who learn the curriculum in order to present the program with only some limited technical support from a teaching artist. While working for the Employer all teaching artists teach. The pool of trained and qualified teaching artists does draw from a wide span of backgrounds in this art. Some have a background in writing and others in musical composition. While they may come from various disciplines in which they have received their training or experience, all teaching artists have a background or specific knowledge in the art of opera. Thus, as teachers teaching the same curriculum they perform the same trade although they draw from different backgrounds and experience.

The Employer also argues that teaching artists are not interchangeable. The record establishes that multiple teaching artists may be assigned to a single school at a given time. While one teacher may be more suitable to teach in one program rather than another, the record does not establish that the replacement of one teaching artist with another cannot happen because skills are so disparate. To the contrary such a situation has occurred, although the record is silent on how frequently this situation arises.

D. Peter Hoyle is an Employee and should be placed in the unit

Peter Hoyle, a "pool" teaching artist, requested and was granted a full-time position with the Employer in July 2002. His teaching work constitutes a substantial portion of his work responsibilities. While teaching, Mr. Hoyle works in the same school setting as other teaching artists.

The Employer contends that in addition to his teaching duties, Mr. Hoyle has significantly different job responsibilities from the other teaching artists and should be excluded from the unit because he is either a managerial or supervisory employee and because he has significantly different terms and conditions of employment from the others by virtue of his full-time employment.

While Mr. Hoyle spends time traveling in New Jersey seeking schools that might be interested in offering the Employer's programs and has come up with the idea for a new program, entitled "Fine Arts Day", there is insubstantial evidence that Mr. Hoyle is a manager or supervisor within the meaning of the Act. Managerial employees are those individuals who have the authority to formulate, determine, or effectuate employer policies by expressing and making operative the decisions of their employer and those who have discretion in the performance of their jobs independent of their employer's established

policies. *Tops Club, Inc*., 238 NLRB 928, fn 2 (1978); *Bell Aerospace,* 219 NLRB 384 (1975). In *NLRB v.Yeshiva University*, 444 US 672 (1980),
the Supreme Court noted that managerial employees have the authority to "formulate and effectuate management policies by expressing and making operative the decisions of their employer." They are high-ranking individuals in the employer's structure.

Here, Mr. Hoyle who was described as a multi-talented individual, has performed some tasks that involve research and the development of ideas for new programs for the Employer's education department. Such research and program development does not instill in Mr. Hoyle managerial responsibility. He also sells the program to schools in New Jersey, likened on the record by his supervisor, Ruth Nott, to a "Tupperware" sales person. These responsibilities are not managerial duties. He did offer a program to a school at a rate not authorized by the Employer. He was thereafter admonished that this was not in accordance with the Employer's policies.

Similarly the record fails to establish that Mr. Hoyle is a supervisor. While the record indicates that he may have requested certain teaching artists be assigned to programs he developed, the record does not contain any specific evidence on how that recommendation or recommendations were made, to whom they were made and on what basis they were made. Thus, the record fails to establish that Mr. Hoyle is a supervisory employee within the meaning of the Act.

While Mr. Hoyle performs duties and functions not within the teaching duties of the unit, employees who perform more than one function for the same employer are eligible to vote even if they spend less than the majority of their time doing unit work, if they regularly perform duties similar to those performed by unit employees for sufficient periods

of time to demonstrate that they have a substantial interest in working conditions in the unit. *Berea Publishing Co.,* 140 NLRB 516 (1963); *Avco Corp*, 308 NLRB 1045 (1992).

Thus I conclude that Mr. Hoyle is eligible to vote as a teaching artist employed by the Employer.

E. **The SSDC Role**

The SSDC does not represent any teaching artists as an exclusive collective-bargaining representative. The record reflects that Melanie Martin Long and Stephen Golux asked the Employer to issue their individual contracts through the SSDC. This labor organization, of which Ms. Long and Mr. Golub are members, represents them for the work they perform which is unrelated to their teaching work. SSDC does not represent these employees as their Section 9(a) representative for worked performed in the bargaining unit sought herein. The SSDC[2] appeared to have acted as personal representatives of these two employees in negotiating their individual employment agreements. The Board has long held that membership in a union for work in a separate and distinct unit does not exclude such employees from representation by a second union for work in another appropriate unit. See *Warner Bros. Pictures, Inc*, 35 NLRB 739 (1941).

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, and in accordance with the discussion above, I conclude and find as follows:

A. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[2] SSDC did not file a notice of appearance in this matter, nor did they indicate a desire to represent the unit sought herein.

B. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

C. The Petitioner, a labor organization, seeks to represent certain employees of the Employer.

D. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

E. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time teaching artists employed by the Employer, excluding all other employees[3] office clerical employees and guards and supervisors as defined in the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election[4] among employees in the unit found appropriate above. The employees will vote on the question of whether or not they wish to be represented by the Associated Musicians of Greater New York, Local 802, AFM, AFL-CIO for the purposes of collective bargaining. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this decision.

[3] The parties stipulated that certain employees have left the Employer's pool of teaching artists and are not eligible to vote in the election.

[4] Pursuant to Section 101.21(d) of the Board's Statement of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this Decision.

A. Voter Eligibility

At the hearing, the parties stipulated that those eligible to vote in the election are all teaching artists of the Employer who were employed during Fiscal year 2003, excluding those individuals in the pool of teaching artists who have not worked during that fiscal year or who have moved from the area and are no longer available to work for the Employer, such as Margie Duffield, Sarah Perry, Gloria Parker, Bo Bell, Martin Vasquez, Lisa Berger, Debra Scesa, Joe Harnes, Gary Wendt and Mary Jo Lassen.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly it is hereby directed that within 7 days of this Decision, the Employer must submit to the Regional Office, an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 26 Federal Plaza, Room 3614, New York 10278, on or before **September 29, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a

request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuously visible to potential voters for a minimum of 3 full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services,* 317 NLRB 349 (1995). An employer who fails to do so may not file objections based on the non-posting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., DST, on **October 6, 2003**. This request may not be filed by facsimile.

DATED at New York, NY, this 22nd day of September 2003.

Karen P. Fernbach

Karen P. Fernbach, Acting Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614

New York, NY 10278

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